FILE COPY

No. 663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

WHEELING STEEL CORPORATION (a corporation),
APPELLANT,

vs.

FRED L. FOX, STATE TAX COMMISSIONER OF WEST VIRGINIA, AND KARL G. SAILER, ASSESSOR OF OHIO COUNTY, WEST VIRGINIA,
APPELLEES.

BRIEF FOR APPELLANT

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APPELLEES.

BRIEF FOR APPELLANT

This case is on appeal from a judgment of the Circuit Court of Ohio County, West Virginia, which held that the appellant, a Delaware corporation, owning property and doing a manufacturing business in West Virginia and other states, is subject to a property tax in West Virginia upon its total intangible property, except that portion thereof which is actually taxed elsewhere during the same tax period. The Supreme Court of Appeals of West Virginia, which is the highest court of said State, refused to review the judgment in question.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Circuit Court of Ohio County, West Virginia, delivered at the time the original judgment order of that Court was handed down, is reported in The Corporation Tax Service for West Virginia, published by The Corporation Trust Company, page 2540, paragraph 2411, under the caption "Matter of Wheeling Steel Corporation", and is included in the record herein at pages 47 to 61.

The opinion of the Supreme Court of Appeals of West Virginia is reported "In re Wheeling Steel Corporation Assessment," _____ W. Va. _____, 177 S. E. 535, and is included in the record herein at pages 62 to 66.

THE JURISDICTION OF THIS COURT

The appellant has heretofore filed the Statement as to Jurisdiction on appeal required by paragraph 1 of Rule 12.

STATEMENT OF THE CASE

This case was submitted upon an agreed statement of facts (R. 1-13), upon agreed facts embodied in an order of the Circuit Court of Ohio County (R. 14-15) and upon an Additional Stipulation (R. 70-72).

The Appellant and its Business.

The appellant was on January 1, 1933 and is now a Delaware corporation engaged in the manufacture of steel and steel products. It maintains the usual statutory office in that State, and pays the taxes required by the laws of Delaware to be paid by a domestic corporation (R. 3).

At the time of the assessment complained of, January 1, 1933, the appellant was qualified to do business in West

Virginia and other states as a foreign corporation. While it had its general business offices in Wheeling, Ohio County, West Virginia, where the management functioned and such records were kept as are customarily kept at a general office, its principal manufacturing plants were located in the State of Ohio. During the year preceding the assessment complained of, shipments from the appellant's plants located outside of West Virginia, principally in Ohio, totalled $13,787,742.25, which constituted 75.80% of its total shipments. Sales offices were located in major cities throughout the country, orders and contracts being subject to acceptance or rejection at Wheeling. Other offices were mainained and records kept at the various plants and some of its corporate functions were performed in Delaware and New York. (R. 3-8).

On January 1, 1933, the date of the assessment of intangible personalty herein involved, the assessed value of the appellant's real estate and tangible personal property in West Virginia was only 27.10% of the assessed value of its total real estate and tangible personal property (R. 6).

Other bases for comparison beween activities of the appellant carried on in West Virginia and outside West Virginia appear at pages 7 and 8 of the Record herein.

On January 1, 1933 — the date of the assessment involved herein — the appellant had on deposit to its credit in various banks the sum of $2,307,773.61, of which the sum of $849,161.99 was in West Virginia banks (R. 11).

The sum of $53,072.63, included within said sum of $849,161.99, had been received by appellant on account of sales of goods sold and manufactured in and shipped from West Virginia to purchasers resident in West Virginia. The sum of $68,612.28, likewise included in said sum of

$849,161.99, had been received by appellant on account of goods sold and manufactured in West Virginia but shipped to purchasers resident in states other than West Virginia. The remainder of said sum of $849,161.99 on deposit in West Virginia had been received by appellant from sales of goods manufactured in and shipped from points outside West Virginia (R. 15).

The total amount of accounts and notes receivable due the appellant on said January 1, 1933, was $2,234,743.11 (R. 12).

The sum of $302,100.42, included within said sum of $2,234,743.11, was the amount of receivables due appellant on January 1, 1933, for goods sold and manufactured in and shipped from West Virginia to non-residents of West Virginia, and the sum of $72,310.00, likewise included within said sum of $2,234,743.11, was the amount of receivables due appellant on said date for goods sold and manufactured in and shipped from West Virginia to residents of West Virginia (R. 14-15).

The Statutes Involved.

The West Virginia statutes, insofar as they are relevant to this case, contain the following provisions:

Chapter 11, Article 3, Section 12 of the Code of West Virginia as amended by Chapter 38 of the Acts of the Legislature, 1933, Extraordinary Session, (Michie 1933 Supplement, Section 681) provides that "Each incorporated company foreign or domestic having its principal office or chief place of business in this State, or owning property subject to taxation in this State_____" shall annually make a written report showing inter alia the following items:

> "(c) the amount of money on hand or on deposit anywhere subject to its check or draft, on the first day of the assessment year;

"(d) the amount of credits and investments other than its own capital stock held by it on said date; with their true and actual value; ----------"*

(The only material change in this Section made by the 1933 Amendment was the omission of the privilege of deducting indebtedness when reporting for taxation money, credits and investments owned by the taxpayer (R. 52-54). The Supreme Court of Appeals of West Virginia held, in **Union Mortgage Investment Co. v. Fox, ---- W. Va. ----,** 175 S. E. 217, that the 1933 Amendment applied to the assessment year beginning January 1, 1933.)

Chapter 11, Article 3, Section 13 of said Code (Michie 1932 Code, Section 682) provides that the assessor, upon receiving the report above-mentioned, if satisfied with the correctness thereof, "shall assess the value of all the property of said corporation liable to taxation," and that "all property mentioned in items (c) and (d) shall, together with their valuation, be entered in the personal property book of the county, and in the magisterial district wherein is the principal office or chief place of business of such corporation-------"*

Chapter 11, Article 5, Section 1 of said Code as amended by Chapter 40 of the Acts of Legislature, 1933, (Michie 1933 supplement, Section 716) defines the personal property subject to taxation in West Virginia.* (The 1933 Amendment made no change in this Section material to this case.)

Chapter 11, Article 3, Section 15 of said Code, as amended by Chapter 40 of the Acts of the Legislature, 1933 (Michie 1933 Supplement, Section 684) provides for the assessment of property used in trade or business by natural

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*The full text of this section of the West Virginia Code is printed in the Appendix hereto.

persons.* (The 1933 Amendment made no change material to this case.)

Chapter 31, Article 1, Section 79 of the Official Code of West Virginia of 1931 (Michie 1932 Code, Section 3091) prescribes the conditions under which foreign corporations are permitted to hold property and transact business in that State.*

Chapter 11, Article 12, Section 71 of said Official Code (Michie 1932 Code, Section 939) provides that the license tax payable by a foreign corporation doing business in the State shall be at the rate prescribed for domestic corporations, "plus fifty per cent of such tax".*

Chapter 11, Article 6, Section 2 of the Official Code of West Virginia of 1931 (Michie 1932 Code, Section 728) provides that railroad companies shall report for taxation "(f) personal property, of every kind whatsoever, including money, credits and investments wholly held or used in this State, showing the amount and value thereof in each county;-----"*

The Tax in Dispute.

The appellant filed with the assessor of Ohio County, West Virginia, as required by Chapter 11, Article 3, Section 12 of the Code, **supra,** its property tax return for the assessment year beginning January 1, 1933 (R. 9). Having been advised by counsel that the total of its bank deposits and the total of its accounts and notes receivable were not taxable in West Virginia, and since the West Virginia statutes did not prescribe how the portion of such property taxable in West Virginia should be determined, the appellant devised its own methods of allocation.

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*The full text of this section of the West Virginia Code is printed in the Appendix hereto.

Appellant reported as the amount of cash taxable in West Virginia that proportion of its total cash which the sum of its West Virginia payrolls and West Virginia purchases during 1932 bore to its total payrolls and purchases during that year (R. 12).

Appellant reported as the amount of accounts and notes receivable taxable in West Virginia only those accounts and notes receivable owed to it by residents of West Virginia (R. 13).

The assessor of Ohio County rejected this report, insofar as it purported to be a return of intangible personal property for taxation, and assessed the appellant upon its total cash in banks and total accounts and notes receivable. Upon statutory appeal to the State Tax Commissioner, that official upheld the action of the assessor, with minor variations, and directed that the appellant be assessed for taxation upon its total intangible personal property.

The appellant thereupon appealed to the Circuit Court of Ohio County, West Virginia, which, upon consideration of such appeal, reduced the assessment to an amount equalling the accounts and notes receivable derived from shipments of material manufactured by appellant in West Virginia and shipped from its West Virginia plants to customers located both within and without the State of West Virginia, plus that portion of the money deposited in West Virginia banks allocated to West Virginia business upon the same basis (R. 60).

From this judgment of the Circuit Court the State Tax Commissioner and the Assessor of Ohio County appealed to the Supreme Court of Appeals of West Virginia. The said Supreme Court of Appeals reversed the judgment of the Circuit Court of Ohio County and held that the entire business of the appellant had been so localized in West Vir-

ginia that its entire intangible property had acquired a prima facie situs for taxation in that state, permitted the deduction of appellant's intangible property taxed in the State of Ohio during the same tax period and remanded the case to the said Circuit Court of Ohio County for further proceedings (R. 62-67).

Pursuant to said remand further proceedings were had in said Circuit Court of Ohio County and thereupon the said Circuit Court entered the judgment order dated July 8, 1935 (R. 67-69) which is the subject of this appeal. The appellant applied to the Supreme Court of Appeals of West Virginia for a Writ of Error to said judgment but its petition was denied by said Court without opinion.

SPECIFICATION OF THE ASSIGNED ERRORS INTENDED TO BE URGED.

The appellant has heretofore adopted its assignments of error as its statement of the points to be relied upon, in conformity with Rule 13 (R. 84-85). Assignments of error were duly filed (R. 75). The following are the assigned errors intended to be urged:

1. The Circuit Court of Ohio County (and the Supreme Court of Appeals of West Virginia, in declining to review the judgment of said Circuit Court) erred in refusing to hold invalid Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, in their application to this appellant, a Delaware corporation doing business in West Virginia and other States, since they tax property of this appellant outside the jurisdiction of the State of West Virginia and thus deprive this appellant of property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the United States Constitution.

2. The Circuit Court of Ohio County (and the Su-

preme Court of Appeals of West Virginia, in declining to review the judgment of said Circuit Court) erred in sustaining the validity of Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, in the application to this appellant, a Delaware corporation doing business in West Virginia and other States, and in construing said Sections to authorize the assessment for taxation in and by West Virginia of

(A) Any portion of this appellant's intangible personal property;

(B) All of this appellant's intangible personal property except that portion thereof which may have been taxed in and by States other than West Virginia;

(C) That portion of this appellant's intangible personalty consisting of accounts and notes receivable derived from shipments of products manufactured in and shipped from plants located in States other than West Virginia;

(D) That portion of this appellant's intangible personal property consisting of accounts and notes receivable derived from shipments of products manufactured in and shipped from plants located in States other than West Virginia to customers located in States other than West Virginia;

(E) That portion of this appellant's intangible personal property consisting of accounts and notes receivable derived from shipments of products manufactured in and shipped from plants located in West Virginia to customers located in States other than West Virginia;

(F) That portion of this appellant's intangible personal property consisting of cash on deposit in banks located in States other than West Virginia;

(G) That portion of this appellant's intangible personal property consisting of cash on deposit in banks located in States other than West Virginia derived from business done in States other than West Virginia;

(H) That portion of this appellant's intangible personal property consisting of cash on deposit in banks located in West Virginia derived from business done in States other than West Virginia.

3. The Circuit Court of Ohio County (and the Supreme Court of Appeals of West Virginia, in declining to review the judgment of said Circuit Court) erred in refusing to hold invalid Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, in their application to this appellant, a Delaware corporation doing business in West Virginia and other States, and in construing said Sections to authorize the assessment for taxation in and by West Virginia of all this appellant's intangible personal property, except that portion thereof which may have been taxed in and by States other than West Virginia, since said Sections, when read in connection with Section 15 of said Article and Chapter, which limits the assessment for taxation of similar property owned by an individual or unincorporated firm to money derived from or belonging to and credits arising out of business done by such individual or unincorporated firm within the State of West Virginia, operate to deny to this appellant the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the United States Constitution.

4. The Supreme Court of Appeals of West Virginia erred in denying this appellant's Petition for a Writ of Error.

SUMMARY OF ARGUMENT

I. Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, as construed by the State Courts, are in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, for

A. Said Sections, as construed, operate to tax property over which the State has no jurisdiction.

B. Said Sections, as construed, result in multiple taxation.

C. Said Sections do not afford a statutory basis for taxation under the "business situs" theory.

II. Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, as construed by the State Courts, are in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, for

A. Said Sections, when read in connection with Section 15, Article 3 of Chapter 11, which limits the assessment for taxation of similar property owned by an individual or unincorporated firm to money derived from or belonging to and credits arising out of business done by such individual or unincorporated firm within the State of West Virginia, operate to deny to this appellant the equal protection of the laws.

B. Said Sections, when read in connection with Sections 2, 4, 5, 6 and 7, Article 6, Chapter 11 of the Code, which limit the assessment for taxation of similar property owned by persons, firms or corporations operating as public utilities to property "wholly held or used in this State", operate to deny this appellant the equal protection of the laws.

ARGUMENT

I. Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, as construed by the State Courts, are in violation of the Fourteenth Amendment to the United States Constitution, for

A. Said Sections, as construed, operate to tax property over which the State has no jurisdiction.

It is the general rule that a State may not tax property over which it has no jurisdiction. This rule is clear in its application to real estate and tangible personalty, but in view of the fact that intangibles have no situs, the courts have adopted rules varying with the facts in the particular cases before them.

It is the appellant's contention that the state creating a corporation has the sole right to tax the intangible property of that corporation unless such intangible property has acquired a "business situs" elsewhere, that is, that it has been derived from and is being held for use in a purely local business, and, conversely, that a state which is not the domicile of the taxpaying corporation, and in which the intangible property of such corporation has not acquired a "business situs", cannot, consistently with the due process clause of the Fourteenth Amendment, impose a tax upon such property.

Commonwealth of Virginia v. Imperial Coal Sales Company, Inc., (1934), 293 U. S. 15, L. Ed. 171;

Safe Deposit & Trust Co. v. Virginia, (1929), 280 U. S. 83, 74 L. Ed. 180;

Liverpool & L. & G. Ins. Co. v. Board, (1911), 221 U. S. 346, 55 L. Ed. 762;

Baldwin v. Missouri, (1930), 281 U. S. 586, 74 L. Ed. 1056.

The appellant further contends that the statutes of West Virginia and the facts herein do not afford a basis for the taxation of any of appellant's intangible property upon the "business situs" theory. This point is discussed hereinafter under Point IC.

West Virginia is not the domicile of the appellant. The appellant was organized and now exists under and by virtue of the laws of the State of Delaware. It operates in West Virginia, Ohio and Minnesota as a foreign corporation (R. 2), having complied with the laws of each of said states taxing and regulating foreign corporations doing business therein.

The laws of the State of West Virginia do not provide for the domestication of foreign business corporations. On the contrary, Chapter 31, Article 1, Section 79 (Michie 1932 Code, Section 3091) provides that foreign corporations may do business, as foreign corporations, within West Virginia under certain conditions. Foreign corporations doing business within the State preserve their status as foreign corporations. Chapter 11, Article 12, Section 71 (Michie 1932 Code, Section 939) illustrate that different methods are used in caluculating license taxes imposed on foreign, as distinguished from domestic, corporations, and that the policy of West Virginia is to maintain that distinction.

The appellees, in their briefs and arguments before the State Courts, and the Supreme Court of Appeals of West Virginia, in its opinion handed down herein (R. 62-66), took the position that, notwithstanding the facts that the appellant is a foreign corporation, that 72.90% if its real estate and tangible personal property is located outside West Virginia, and that 75.80% of its shipments in 1932 originated from its manufacturing plants located outside West Virginia, its entire business had been localized in West Virginia. The said Supreme Court of Appeals said (R. 65):

> "The facts agreed herein show that the management of the corporation radiates from Wheeling, and that the major part of its executive business is performed or initiated there. We are of the opinion that such a localization of the corporation's business at Wheeling imparts to its entire intangible property a prima facie situs for taxation at that place."

Such a decision overthrows the distinction between domestic and foreign corporations now existing in the law, and attempts to substitute therefor a distinction depending, apparently, upon the place where the executive and management functions are exercised. It transfers to the place of control at least one of the attributes of domicile — the power to tax the total intangible property of a corporate taxpayer irrespective of the fact that its real estate and tangible personal property may be located elsewhere.

From the Court's finding that all the property of the appellant is controlled by the executive offices in West Virginia, the State Court deduces that all the intangible personal property owned by the appellant, wherever it may be said to be located and however arising, except that portion actually taxed in other states, is taxable in and by West Virginia. It may just as well be argued that all the real property and all the tangible personal property owned by the appellant is likewise controlled by the West Virginia office, and, if the State Court's reasoning is correct, should also be amenable to assessment and taxation in West Virginia. But the State Court does not attempt to extend the argument to its logical conclusion. This argument, if extended to real and tangible personal property, would, of course, be met with the rule that taxation of such property outside the jurisdiction of the taxing authority is a deprivation of property without due process, in contravention of the Fourteenth Amendment to the United States Constituion.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. Ed. 150.

If taxation of real and tangible personal property located outside the jurisdiction of the taxing authority is deprivation of property without due process, the appellant maintains that the assessment and taxation of intangible personal property located and/or arising from business done outside the jurisdiction of the taxing authority is just as much an attempted deprivation of property without due process.

The appellant owns and operates manufacturing facilities both within and without the State of West Virginia. Only 27.10% of the assessed value of its real estate and tangible personal property is located in West Virginia. Only 24.20% of its shipments originated in West Virginia in 1932. Its West Virginia production was 15.6% of the total production in 1932. Only 19.45% of its employees were employed in West Virginia in 1932. Its West Virginia payrolls were only 16.22% of the total payrolls in 1932. Its West Virginia ingot capacity is only 16.6% of its total ingot capacity, and ingot capacity is a recognized basis of determining the producing ability of a steel company (R. 6-8).

It is clear that the larger portion of appellant's intangibles sought to be assessed and taxed by West Virginia was derived from operations carried on outside West Virginia. If intangibles can have any situs for taxation other than at the appellant's domicile in Delaware, such situs cannot be determined solely by control, for such a rule would result in taxation of property outside the jurisdiction of the State. The use of tangible property, both real and personal, in business, creates intangible property, and it is submitted that the only fair rule for the taxation of property in states other than the state of the domicile is a rule which allocates intangibles on the basis of tangible property owned and used in production of material

for sale. Such a rule will permit each state in which tangible property is located and operated for profit to tax a fair proportion of the intangible property created within its borders.

Let us suppose that this appellant, as it might well do, should acquire suitable office space in Ohio or Pennsylvania, and should move its general books and accounting records to such new office, and should thereafter conduct its business and control its property, including that property located in West Virginia, from Ohio or Pennsylvania. Since any intangible personalty located in or arising from operations conducted in West Virginia would then be "controlled" from an office located outside the State, could it be successfully maintained that such intangible personalty would not be taxable in and by West Virginia?

And let us suppose that there are two Delaware corporations owning property and doing business in West Virginia and in other states, one having its executive offices in West Virginia and the other in another state. Would the Fourteenth Amendment permit West Virginia to tax all the intangible personal property owned by the first corporation and none of the intangible personal property owned by the latter?

The State Court's decision will not stand analysis. Its position is the same as if it had said: "Since this Taxpayer performs executive functions in West Virginia, we will treat it, for the purpose of property taxation, as a domestic corporation, and assess all its intangible personalty for taxation in and by West Virginia, but in other matters, such as franchise taxes, we will treat it as a foreign corporation." The State Court attempts to enlarge the doctrine of "business situs" by drawing to West Virginia all the intangible personalty of a foreign corporation solely on the ground that the control is exercised within its borders.

It is well settled in the law that a corporation is domiciled in the state of its creation, and that it can-

not migrate. It may own property and do business in other states, but its domicile is not thereby changed. To hold that a corporation may have a roving domicile, dependent upon the place its executive functions are exercised from time to time, would be an anomaly. As long ago as 1897 Mr. Justice Brewer, in **Adams Express Co. v. Ohio State Auditor,** 165 U. S. 225, 41 L. Ed. 965, rejected the position taken by the State Courts in the instant case and, at page 224 of the U. S. reports, said:

> "It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was **'Mobilia personam sequuntur,'** but that maxim was never of universal application, and seldom interfered with the right of taxation, **Pullman's Palace Car Co. v. Pennsylvania,** 141 U. S. 18, 22 (35: 613, 616, 3 Inters. Com. Rep. 595). It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the river to Jersey City the situs of $12,000,000 "of intangible properly, for purposes of taxation, was changed from the state of New York to that of New Jersey."

The money and accounts receivable here sought to be taxed are property derived from business done for the most part in the State of Ohio (R. 14-15, items 3-8). The management activities in West Virginia, particularly the "control" emphasized by the State Court, did not create these intangibles. Appellant's business is not localized in West Virginia. Its general offices in Wheeling did not and could not bring into existence such intangibles without the acts of manufacture and shipment in and from the State of Ohio. The most important act — the manufacture of the steel — was performed in Ohio. No money would have been received, and no credits would have been created but for such manufacture. If intangibles arising from

the appellant's Ohio manufacturing operations are taxable in any state, other than Delaware, they are taxable in Ohio. They are not taxable in West Virginia.

Hans Rees' Sons, Inc. v. North Carolina, (1931), 283 U. S. 123, 75 L. Ed. 879;

American Barge Line Co. v. Board, (1933), 55 S. W. (2nd) 416 (Kentucky);

Looney v. Crane Co., (1917), 245 U. S. 178, 62 L. Ed. 230;

Alpha Portland Cement Co. v. Mass., (1925), 268 U. S. 203, 69 L. Ed. 916;

Baldwin v. Missouri, (1930), 281 U. S. 586, 74 L. Ed. 1056;

Beidler v. South Carolina Tax Commission, (1930), 282 U. S. 1, 75 L. Ed. 131;

First National Bank of Boston v. Maine, (1932), 284 U. S. 312, 76 L. Ed. 313.

There is one item of accounts receivable ($59,675.16) which the Circuit Court of Ohio County treated separately (R. 61 — Addendum) and which should be discussed briefly. This sum was owed to appellant by its employees for capital stock purchased by them. The appellant's local business is the manufacture of iron and steel within the State. Investment of surplus funds or, in this case, the extension of credit to its employees, not for the purpose of enabling them to buy iron and steel, but to enable them to purchase stock, cannot properly be said to be a part of its local business. If such receivables are taxable anywhere, they are taxable in Delaware, the domicile of the appellant. They are not taxable within both jurisdictions.

Baldwin v. Missouri, (1930), 281 U. S. 586, 74 L. Ed. 1056;

Rounds & Porter Lumber Co. v. Livesay, (1933), 66 Fed. (2nd) 298.

B. Said Sections, as construed, result in multiple taxation.

It will be noted that the cases hereinafter discussed involve not only property taxes, but also transfer, inheritance, license and income taxes, but it is submitted that the same general jurisdictional principles govern all types of taxation. The court in **Frick v. Pennsylvania,** (1925), 268 U. S. 473, 69 L. Ed. 1058, states that:

> "The tax which it (the Pennsylvania statute) imposes is not a property tax, but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the state. But, to impose either tax, the state must have jurisdiction over the thing that is taxed; and to impose either without such jurisdiction is mere extortion, and in contravention of due process of law."

The modern view of this Court, to the effect that multiple taxation of intangible personal property is repugnant to the due process clause of the Fourteenth Amendment, apparently had its inception in the case of **Safe Deposit & Trust Co. v. Virginia,** (1929), 280 U. S. 83, 74 L. Ed. 180, which denied to Virginia — the domicile of the creator of and cestuis under a trust consisting of stocks and bonds — power to impose a property tax upon the trust estate, on the ground that the securities were owned by and in possession of a trustee domiciled in Maryland. In the majority opinion of the Court, Mr. Justice McReynolds, discussing the maximum mobilia sequuntur personam, said:

> "It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two states at the same instant and because of

this to uphold a double and oppressive assessment."

That intangibles consisting of negotiable bonds and certificates of indebtedness issued by Minnesota and cities in Minnesota are subject to the imposition of an inheritance tax only by the State of the decedent's domicile — New York — was held in **Farmers Loan & Trust Co. v. Minnesota,** (1930), 280 U. S. 204, 74 L. Ed. 371. This case expressly overruled **Blackstone v. Miller,** 188 U. S. 189, 47 L. Ed. 439. Mr. Justice McReynolds, writing the majority opinion, at page 375 of 74 L. Ed., said:

> "While debts have no actual territorial situs we have ruled that a state may properly apply the rule "mobilia sequuntur personam" and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the state where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two states apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. Twenty-four years ago Union Refrigerator Transit Co. v. Kentucky, supra, declared: "In view of the enormous increase of such property (tangible personalty) since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a situs of its own for the purpose of taxation and correlatively to exempt it at the domicile of the owner." And, certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting

theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction.

> "Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

The decision in **Baldwin v. Missouri,** (1930), 281 U. S. 586, 74 L. Ed. 1056, involved other types of intangible property. The State of Missouri had imposed transfer or inheritance taxes upon (1) cash on deposit in Missouri, (2) coupon bonds issued by the United States and (3) sundry promissory notes physically within that State, the majority of which had been executed by citizens of Missouri and were secured by liens upon lands lying therein. The owner died domiciled in Illinois. The Court, through Mr. Justice McReynolds, at page 1059 of 74 L. Ed., said:

> "Ordinarily, bank deposits are mere credits and for purposes of ad valorem taxation have situs at the domicile of the creditor only. The same general rule applies to negotiable bonds and notes whether secured by liens on real estate or otherwise."

and held that, although the bonds and notes were physically in Missouri, "they were not within Missouri for taxation purposes" and that State could not tax the transfer.

In **Baldwin v. Missouri** the Court had an opportunity to apply the "business situs" doctrine. The lower court had said: "It is a reasonable inference that the cash and notes in such large quantities in Missouri, when none of it was held in Illinois, was retained in this state for the purpose of investment." (page 1059 of 74 L. Ed.) But nevertheless the United States Supreme Court refused to follow this lead. Its failure to do so, in our opinion, shows a tendency to discard that theory of taxation. Mr. Justice Holmes, (in his dissenting opinion, page 1061), recognizes that the majority opinion in effect overrules the cases upholding "business situs" as a basis for taxation of intangible property.

In **Beidler v. South Carolina Tax Commission,** (1930), 282 U. S. 1, 75 L. Ed. 131, South Carolina had attempted to impose a transfer tax upon the transfer of open, unsecured indebtedness payable by a South Carolina corporation to the decedent, who died domiciled in Illinois. Mr. Chief Justice Hughes delivered the opinion of the Court, stating that (page 133 of 75 L. Ed.):

> "In reaching its conclusion as to the validity of the tax, the state court relied chiefly upon the decision of this court in Blackstone v. Miller, 188 U. S. 189, 47 L. Ed. 439, 23 S. Ct. 277. That decision has been overruled, and it is now established that the mere fact that the debtor is domiciled within the state does not give it jurisdiction to impose an inheritance or succession tax upon the transfer of the debt by a decedent who is domiciled in another state. Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 74 L. Ed. 371, 65 A.L.R. 1000, 50 S. Ct. 98; Baldwin v. Missouri, 281 U. S. 586, 74 L. Ed. 1056, 72 A.L.R. 1303, 50 S. Ct. 436. The transfer is taxable by the state of the domicile of the deceased owner. Blodgett v. Silberman, 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410. Open accounts, including credits, for cash deposited in bank, fall within this

> principle, and its application is not defeated by the mere presence of bonds or notes, or other evidences of debt, within a state other than that of the domicile of the owner. Baldwin v. Missouri, 281 U. S. 586, 74 L. Ed. 1056, 72 A.L.R. 1303, 50 S. Ct. 436, supra."

A later case decided by this Court involving this question is **First National Bank of Boston v. State of Maine,** (1932), 284 U. S. 312, 76 L. Ed. 313, which held that an inheritance tax may not be imposed by the state of incorporation upon shares of stock belonging to a non-resident stockholder. The Court, speaking through Mr. Justice Sutherland, repeats that Blackstone v. Miller (supra) was overruled by the Farmers Loan Company case (supra), and states that the case of Frick v. Pennsylvania (supra)

> "_____was one of the latest to approve that case and give countenance to the general doctrine that intangible property (unlike tangible property) might be subjected to a death transfer tax in more than one state; but this and all other instances of such approval, whether express or tacit, with the overthrow of the foundation upon which they rested, have ceased to have other than historic interest."

The opinion discusses in detail Frick v. Pennsylvania, Safe Deposit & T. Co. v. Virginia, Farmers Loan & Trust Co. v. Minnesota, Baldwin v. Missouri, and Beidler v. South Carolina Tax Commission, all hereinabove cited, traces through them the development of the modern conception that the transfer of intangible personalty, whether bonds, shares of stock, promissory notes, open accounts or other choses in action, may be taxed only by the state of the decendent's domicile, and holds that the exaction of such a tax by any other state is not within the power of such state under the Fourteenth Amendment.

The Court refers with approval to the quotation from Frick v. Pennsylvania with which this discussion is pre-

faced, and therefore inferentially holds that the principles expressed in its most recent opinions are applicable not only to inheritance taxes, but also to property taxes.

A franchise or license tax imposed by a state upon a foreign corporation for the privilege of doing business within that state, but measured in part by property owned or business done outside that state, is a deprivation of property without due process of law.

Looney v. Crane Company, (1917), 245 U. S. 178, 62 L. Ed. 230;

Alpha Portland Cement Co. v. Massachusetts, (1924), 268 U. S. 203, 69 L. Ed. 916.

An income tax imposed by a state upon a foreign corporation measured in part by income received from property owned or business done outside that state, is a deprivation of property without due process of law.

In **Hans Rees' Sons, Inc. v. State of North Carolina,** (1931), 283 U. S. 123, 75 L. Ed. 879, the Court, speaking through Mr. Chief Justice Hughes, at page 905 of 75 L. Ed. said:

> "Undoubtedly, the enterprise of a corporation which manufactures and sells its manufactured product is ordinarily a unitary business, and all the factors in that enterprise are essential to the realization of profits. The difficulty of making an exact apportionment is apparent and hence, when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases. But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation, the

activities which are conducted in different jurisdictions are to be regarded as "component parts of a single unit" so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state. As was said in the Bass, Ratcliff & Gretton Case with regard to "the unitary business of manufacturing and selling ale" which began with manufacturing in England and ended in sales in New York, that state "was justified in attributing to New York its proportion of the profits earned by the company from such unitary business". And the principle that was recognized in National Leather Co. v. Massachusetts, 277 U. S. 413, 72 L. Ed. 935, 48 S. Ct. 534, supra, was that a tax could lawfully be imposed upon a foreign corporation with respect to "the proportionate part of its total net income which is attributable to the business carried on within the state." When, as in this case, there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a state has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction."

Newport Company v. Wisconsin Tax Commission, (1935), ____ Wis. ____, 261 N. W. 884.

It is apparent from these cases that the Fourteenth Amendment forbids (1) multiple taxation of intangibles and (2) taxation by a state of property outside its jurisdiction, and that the tendency of this Court is to confine to the state of the domicile power to tax intangibles.

Upon application of these principles to the case at bar, we find that the State Court's decision, directing the assess-

ment for taxation of appellant's total cash and total accounts and notes receivable, disregards the prohibition in the Fourteenth Amendment to the United States Constitution against taking property without due process of law and

1. Imposes a property tax upon the total accounts and notes receivable payable to a taxpayer domiciled in Delaware.
2. Impose a property tax upon accounts and notes receivable payable to a taxpayer domiciled in Delaware and arising from business done outside the State of West Virginia.
3. Imposes a property tax upon money owned by a taxpayer domiciled in Delaware and deposited in states other than West Virginia.
4. Imposes a property tax upon money owned by a taxpayer domiciled in Delaware and on deposit in West Virginia, the larger part of which was derived from business outside of West Virginia.
5. Imposes a property tax upon that portion of the money owned by a taxpayer domiciled in Delaware and on deposit in West Virginia which is not maintained in West Virginia for use in the owner's West Virginia business.

The fact that the State Court's opinion, (R. 66), permits the deduction of intangible property owned by the appellant and taxed in Ohio during the same tax period does not assist in any determination of the question of jurisdiction to tax.

As stated in the Agreed Statement of Facts (R. 13):
"In order to determine the amount of accounts receivable of a foreign corporation subject to taxation in Ohio, the Ohio statutes provide that current accounts payable shall be deducted from the total of current ac-

counts receivable and prepaid items, and that the result shall be apportioned in accordance with the ratio of current accounts receivable arising from business transacted within Ohio to the total current accounts receivable. Under these Ohio statutes the Wheeling Steel Corporation has been assessed as of January 1, 1933, on accounts and notes receivable amounting to $250,133.42, which amount is included in the total amount of accounts and notes receivable assessed against the Wheeling Steel Corporation by the Assessor of Ohio County and the Tax Commissioner as of January 1, 1933."

It will be noted that, in order to determine the amount of the tax, Ohio permits current accounts payable to be deducted from the total of the receivables and prepaid items. Thus, although all Ohio receivables are taxable in Ohio, only the excess of receivables and prepaid items over current payables is actually taxed. This deduction of current indebtedness accounts for the fact that intangibles amounting only to $250,133.42 were taxed in Ohio as at January 1, 1933, but the formula for determining receivables taxable in Ohio takes into consideration all the accounts receivable arising from business transacted within Ohio. All the receivables arising from business transacted within Ohio are taxable there and could be taxed in that state if Ohio should at some time prohibit the deduction of indebtedness, which is not improbable in view of the fact that West Virginia has prohibited the deduction of indebtedness (R. 52-53).

The State Court acknowledges that Ohio has power to tax a portion of the appellant's intangibles, apparently under the "business situs" theory. Suppose Ohio did not choose to exercise that power. Would West Virginia, because of Ohio's failure to exercise an acknowledged power, acquire jurisdiction to tax intangibles derived from Ohio

business? West Virginia's attempt to tax property over which it does not have jurisdiction is contrary to the Fourteenth Amendment.

It is evident from the cases above cited that no state other than the domicile of the owner may tax intangible personal property which has not acquired a business situs within its borders. That the Court failed to apply the business situs doctrine to the facts in **Baldwin v. Missouri,** supra, may mean that the doctrine is no longer considered law by this Court.

It is also evident that no state may measure the franchise, license or income tax imposed by it upon a foreign corporation by property owned and business done outside the state, or income from such property and business. If the property owned and business done outside the state may not be used as a measuring stick, **a fortiori** the property itself may not be taxed.

C. Said Sections do not afford a statutory basis for taxation under the "business situs" theory.

The more important so-called "business situs" cases were decided by this Court during the period of time from 1899 to 1911, and are:

New Orleans v. Stempel, (1899), 175 U. S. 309, 44 L. Ed. 174;

Bristol v. Washington County, (1900), 177 U. S. 133, 44 L. Ed. 701;

State Assessors v. Comptoir National D'Escompte, (1903), 191 U. S. 388, 48 L. Ed. 232;

Metropolitan Life Ins. Co. v. New Orleans, (1907). 205 U. S. 395, 51 L. Ed. 853;

Liverpool & L. & G. Ins. Co. v. Board of Assessors, (1911), 221 U. S. 246, 55 L. Ed. 762.

In **New Orleans v. Stempel,** and in **State Assessors v. Comptoir National D'Escompte,** the decisions rested upon the physical presence of the notes, etc., within the taxing jurisdiction. The latter case cites **Blackstone v. Miller** as an authority. We need give no further attention to these cases in view of Mr. Justice Sutherland's general condemnation of **Blackstone v. Miller** and its doctrine in the discussion of **First National Bank of Boston v. State of Maine,** supra.

In Bristol v. Washington County the taxpayer was domiciled in New York, but carried on a business of loaning money in Minnesota through an agent. The notes, apparently executed by Minnesota debtors since they were secured by mortgages on Minnesota property, were not kept in that State, but were kept in New York, except when their presence was necessary in Minnesota for the purpose of renewal, foreclosure, etc. The Court held that the absence of the notes from the taxing jurisdiction was immaterial.

In **Metropolitan Life Insurance Company v. New Orleans** a non-resident insurance company made loans to its Louisiana policy holders. The notes were kept in New York, and the Court, citing **Bristol v. Washington County** and **Blackstone v. Miller,** held the Louisiana tax proper.

Liverpool & L. & G. Ins. Co. v. Board of Assessors did not involve notes or specialties. The property permitted to be taxed by Louisiana was the amount due to the insurance company from its policy holders in Louisiana for premiums on which credit of thirty and sixty days had been extended. Counsel for the insurance company attempted to make a distinction between notes and credits not evidenced by a writing, but this Court, through the

present Chief Justice, at page 354 of the U. S. Reporter, said:

> "The asserted distinction cannot be maintained. When it is said that intangible property, such as credits on open account, have their situs at the creditor's domicil, the metaphor does not aid. Being incorporeal, they can have no actual situs. But they constitute the property; as such they must be regarded as taxable, and the question is one of jurisdiction.
>
> "The legal fiction expressed in the maxim **mobilia sequuntur personam** yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicil. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor, and is of value to the creditor, because he may be compelled to pay; and power over the debtor at his domicil is control of the ordinary means of enforcement. Blackstone v. Miller, 188 U. S. pp. 205, 206, 47 L. Ed. 444, 445, 23 Sup. Ct. Rep. 277. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the state, and there the rights of the creditors were to be enforced. If locality, in the sense of subjection to sovereign power could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there."

Twice in this quotation the Chief Justice emphasizes that the taxing state is the domicile of the debtors. Later, in the same opinion, he states:

> "But, as we have seen, the jurisdiction of the state of his domicil, over the creditor's person, does not exclude the power of another state in which he transacts his business, to lay a tax upon the credits there accruing to him against resident debtors, and thus to enforce contribution for the support of the government under whose protection his affairs are conducted."

The opinion is undoubtedly confined to a tax upon amounts due from resident debtors arising from business conducted within the state. In no case found by counsel for appellant has this Court extended the doctrine of "business situs" further.

The decision of the State Court in the instant case, (R. 62-66), is not confined within the limits set by this Court in the case of **Liverpool & L. & G. Ins. Co. v. Board of Assessors, supra,** for it imposes a property tax upon accounts and notes receivable payable to a taxpayer domiciled in Delaware and arising from shipments of products manufactured in and shipped from plants located in West Virginia to customers who are non-residents of West Virginia.

It was upon consideration of **Liverpool & L. & G. Ins. Co. v. Board of Assessors,** in connection with the recent United States Supreme Court cases above discussed, that led the appellant to report for taxation in West Virginia (1) that portion of its total deposits necessarily maintained in banks located in West Virginia for use in its West Virginia business and (2) only those accounts and notes receivable which were owed to it by residents of West Virginia.

It is doubtful that the "business situs" theory of taxa-

tion, even if it would now be upheld by this Court, is applicable under West Virginia statutes. Baldwin v. Missouri supra.

It should be remembered that in the "business situs" cases the Court was applying a particular statute, and that unless a similar statute is involved, it cannot be properly be said that those cases are applicable. The Louisiana statutes involved in the "business situs" cases above cited contain the following or similar provisions: (The statute is quoted from **New Orleans v. Stempel).**

> "And this shall apply with equal force to any person or persons representing in this state business interests that may claim a domicil elsewhere, the intent and purpose being that no non-resident, either by himself or through any agent, shall transact business here without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations, or credits arising from the business done in this state are hereby declared assessable within this state, and at the business domicil of said non-resident, his agent, or representative."

The above quoted Louisiana statute expressly provides that receivables arising from business done in that state shall be assessed for taxation there. The West Virginia statutes, however, contain no provision for allocation to that State of intangible property which is within its jurisdiction, as distinguished from such property over which it has no jurisdiction.

Upon analyzing the statutes, we find that Chapter 11, Article 3, Section 12 (Michie 1933 Supplement, Section 681) provides that "Each incorporated company foreign or domestic having its principal office or chief place of business in this State, or owning property subject to taxation in

this state," shall make a written report showing the following items:

> "(a) the amount of capital authorized to be employed by it;
>
> "(b) the amount of cash capital paid on each share of stock;
>
> "(c) the amount of money on hand or on deposit anywhere subject to its check or draft, on the first day of the assessment year;
>
> "(d) the amount of credits and investments other than its own capital stock held by it on said date, with their true and actual value;
>
> "(e) the quantity, location and true and actual value of all of its real estate, and the magisterial district or districts in which it is located;
>
> "(f) the kinds, quantity and true and actual value of all its tangible property in each magisterial district in which it is located."

Thus the appellant, a Delaware corporation owning real and tangible personal property subject to taxation in West Virginia, and also owning similar property subject to taxation in other states, is required to report, under items (c) and (d) above, its total money on hand or on deposit subject to its check, and its total credits and investments. Said Section 12 makes no provision for reporting only that portion of the money and credits which may be subject to taxation in West Virginia.

Chapter 11, Article 3, Section 13 (Michie 1932 Code, Section 682) assumes to provide rules for the assessor to follow in listing for taxation the property reported under the provisions of the foregoing Section 12. It provides that if the assessor is satisfied with the correctness of the report,

that is, if he believes that the reporting corporation has reported all its property, whether such property is taxable in West Virginia or not, he "shall assess the value of all the property of such corporation liable to taxation." Said Section 13 also provides that "the property mentioned in items (c), (d), (e) and (f) shall constitute all the property on which such corporation shall be liable to pay taxes."

Does this Section 13 mean that all property reported shall be assessed for taxation, or that the assessor shall determine in his own mind what portion of the property reported shall be assessed?

If it means that all property reported under the requirements of Section 12 shall be assessed for taxation, it is clearly unconstitutional in its application to the appellant, for, as appears in other portions of this Brief, all of the money and credits owned by the appellant is not taxable in West Virginia. If it means that the assessor shall himself devise ways and means for determining how the total property reported shall be divided into property taxable in West Virginia and property which is not taxable in West Virginia, it is likewise unconstitutional, for that is a legislative, not an administrative function. If it be argued that the assessor may, without specific direction by the Legislature, divide such property into taxable and non-taxable items subject to review by the courts, the statute is unconstitutional, for assessment is not a judicial function.

Article V, Section 1, of the West Virginia Constitution reads as follows:

Division of Powers

"1. The Legislative, Executive and Judicial Departments shall be separate and distinct, so that nei-

ther shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature."

Consideration of Chapter 11, Article 5, Section 1 (Michie 1933 Supplement, Section 716) is of no material assistance in this connection. Said Section 1 provides that "all personal property in the State, though owned by persons residing out of the State, shall be entered in the personal property book and be subject to equal and uniform taxation", but there is no provision in Chapter 11, Article 3, Section 12, or in any other Section of the Code found by counsel, pertaining to the taxation of property owned by ordinary business corporations, providing that a foreign corporation shall report to the assessor only that portion of its intangible personal property which is in the State, or providing any method for determining what part of its intangible property is "in the State." Such a corporation is required to report all its intangible personalty, wherever located or used and howsoever acquired.

How, then, is the assessor to determine what portion, if any, of the total personal property owned by a foreign corporation and reported by it in accordance with the provisions of Chapter 11, Article 3, Section 12, is liable to taxation in West Virginia? The above mentioned Chapter 11, Article 3, Section 12 prescribes the only form of report required.

It is axiomatic that administrative officers charged with the assessment of taxes must make their assessments in the manner prescribed by law. If the Legislature has not prescribed a clear and specific manner in which taxes shall be assessed, neither the administrative officers nor the

courts may supply the defect. Statutes imposing taxes are to be construed most strongly against the government and in favor of the taxpayer.

Commonwealth v. P. Lorillard Co., Inc., (1921), 129 Va. 74, 105 S. E. 683;

County of Sussex v. Jarratt, (1921), 129 Va. 672, 106 S. E. 384, 627;

Commonwealth v. Wilson, (1925), 141 Va. 116, 126 S. E. 220;

Southern Express Company v. Patterson, (1909), 122 Tenn. 279, 123 S. W. 353;

State v. Humble Pipe Line Co., (1923), 112 Tex. 375, 247 S. W. 1082.

In **Commonwealth v. P. Lorillard Co., Inc., supra**, the Virginia statute, under which an income tax was assessed against the Lorillard Company, read as follows:

> "The classification under Schedule D providing for the taxation of income shall be as follows, to wit: The aggregate amount of income of each person or corporation, whether received or due but not received within the year next preceding this first of January in each year, subject to the deduction and exemptions herein below recited."

The Lorillard Company was a New Jersey corporation doing business in various states, including Virginia. The facts of the case, the statute involved, and the decision of the Court are well summarized in the following quotation from the opinion: (page 686 of 105 S. E.)

> "In the case at bar it does not appear how much of the income was derived from business done in Virginia, nor does the statute of 1916 provide any method by which that fact could be ascertained, but the

administrative officers saw that they could not enforce the provisions of the statute as to income derived from business done outside of the state, and, the statute being silent on the subject, they undertook to devise a scheme of their own by which to determine how much of the total income of the defendant in error was derived from business done in this state. The statute conferred no such authority upon them, and they had no such power. The Legislature alone could exercise this power, and, having failed to do so, no such apportionment can be made, and the trial court was right in holding that there was no law in this state under which the income tax sought to be assessed could be collected on so much of the income as was derived solely from business done in this state."

In **Southern Express Company v. Patterson, supra,** the complainant, a Georgia corporation doing business in Tennessee and other states, sued to enjoin Hamilton County, Tennessee, tax officials from attempting to impose a tax upon intangibles. It appeared in the facts that the complainant's entire general auditing and accounting was done in said Hamilton County, Tennessee.

The Tennessee court granted the injunction, and in the course of its opinion, (page 357 of 123 S. W.) said:

"The first section of Chapter 258, p. 632, Acts 1903, under which the proceeding before T. E. Patterson was instituted, enacts that all property real, personal and mixed, shall be assessed for taxation for state, county and municipal purposes, except such as is declared exempt in the next section."

"This includes the intangible property of all corporations, and subjects it to taxation; but this is not sufficient. The requirement that the Legislature provide a mode for the ascertainment of the value of property—the assessment of it—so that it may be

assessed according to its value, and that the taxes collected from it be equal and uniform with those assessed upon other property of the same value, is equally mandatory, and before any property can be valued and assessed for taxation a proper method and machinery for such valuation and assessment must be provided."

The Court, upon analyzing another statute put forth as a justification for the assessment, said (p. 358):

> "It is obvious that the clauses providing that all property of corporations of every kind and description, tangible and intangible, shall be valued and assessed, necessarily exclude corporations doing business in and operating in other states, because the tangible and intangible property belonging to them in such other states is beyond the jurisdiction of the state of Tennessee, and cannot be taxed by it."

In reference to another statute, the Court said (p. 358):

> "This paragraph is the only one which relates to the assessment of the intangible assets of foreign corporations doing business in this and other states, and it contains no provision fixing the situs of the intangible assets of such corporations, or a method for ascertaining their value and assessing them for taxation, and thus fails to accomplish its purpose."

At page 359 of 123 S. W., the Tennessee Court summarized its reasoning and decision as follows:

> "The Legislature having failed to fix the situs of the intangible property of foreign corporations growing out of business done and property owned by them in more than one county in this state, it is to be found in all of the counties where this property and business is located and carried on. The Trustee of Hamilton County would have no authority to assess the entire value of the intangible property of the com-

> plainant in that county, if a method for ascertaining and assessing its value was provided by the statute; but the portion in each and every county would be there assessable. But, in the absence of a method provided for ascertaining its value, it cannot be assessed anywhere. The remedy is not in the courts, but with the Legislature."

In **State v. Humble Pipe Line Co., supra,** the court, at page 1085 of 247 S. W., quoted from **W. U. Tel. Co. v. Texas,** 62 Texas, 630, as follows:

> "It is of the utmost importance, for the protection of the taxpayer, that laws should be certain, both as to the thing taxed and as to the amount of the tax, and the manner for its ascertainment; that the taxpayer may have an opportunity, without the expense of litigation, to pay such taxes as he may owe; and a tax law which does not accomplish this purpose ought to be held invalid, whether this results from an attempted exercise of power not possessed, through which the law becomes uncertain by both proper and improper subjects being combined and selected for taxation, or by the failure of the legislature for any other reason to furnish the rules by which taxes may be levied, assessed and collected."

This Court has recently had occasion to consider the effect of delegation of legislative power in two cases:

> **Panama Refining Company v. Ryan,** (1935), 293 U. S. 388, 79 L. Ed. 446;
>
> **Schlecter Poultry Corporation v. United States,** (1935), 295 U. S. 495, 79 L. Ed. 1570.

In these cases this Court held sections of the National Industrial Recovery Act invalid for the reason that Congress had delegated to the President its legislative power, without establishing the standard of legal obligation.

It is therefore respectfully submitted that the statutes of West Virginia do not contain any method for ascertaining and assessing the intangible personal property of a foreign corporation doing business in this and other states, and that, under the above decisions, no taxes may be levied upon the appellant by reason of its ownership of such property, whether the situs of such property be determined to be in West Virginia or elsewhere.

The parties have agreed and the Circuit Court of Ohio County, in its first judgment order (R. 14-16) found that only $496,095.33 out of a total of $4,491,323.67 of intangible personalty owned by appellant on January 1, 1933, represented proceeds of and/or were derived from sales of goods manufactured in and shipped from West Virginia plants to residents and non-residents of West Virginia. That amount is the largest possible amount which could lawfully be taxed under a proper statute. We have demonstrated above that no such statute exists and that, in the absence of such a statute, none of appellant's intangible personalty is taxable in and by West Virginia, even under the "business situs" theory.

II. Sections 12 and 13 of Article 3 of Chapter 11 of the Code of West Virginia, as construed by the State Courts, are in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, for

A. Said Sections, when read in connection with Section 15, Article 3, Chapter 11 of the Code, which limits the assessment for taxation of similar property owned by an individual or unincorporated firm to money derived from or belonging to and credits arising out of business done by such individual or unincorporated firm within the State

of West Virginia, operate to deny to this appellant the equal protection of the laws.

We have demonstrated above under Point I that neither Section 12 nor Section 13 of Article 3, Chapter 11 establishes criteria upon which the assessor shall decide what part, if any, of the total intangibles reported shall be assessed for taxation. The State Court, however, took the position that, since all such property must be reported, the legislature intended that all of it, except that portion taxed in other States, should be taxed in West Virginia. If that is the proper interpretation these sections discriminate unlawfully against business corporations and in favor of natural persons.

Chapter 11, Article 3, Section 13 Michie 1933 supplement, Section 684) reads in part as follows:

> "ASSESSMENT OF CAPITAL USED IN TRADE OR BUSINESS BY NATURAL PERSONS. — The value of the capital used by any individual or firm not incorporated, in any trade or business taxable by law, shall be ascertained in the following manner: The owner, agent, or chief accountant of every such trade or business____carried on in any county of the State, shall, annually____make a written report as of the first day of the assessment year to the assessor____ showing the following matters and things, viz:____(c) the amount of all money derived from or belonging to such trade or business, on hand or remaining uninvested on that day, whether in or out of the State, payable to such individual or firm; (d) the amount in value of all credits arising out of any such business and remaining unpaid on that date, whether due or not, and whether in or out of the State; (e) the amount and true and actual value of all money, notes, bonds, bills, accounts receivable, stocks and other intangible property made by such person or firm whether in or

> out of the State, other than those hereinbefore specified;____the personal property mentioned in such report he shall enter in the personal property book of his county for assessment with taxes____"

The above quoted Section 15 assumes to tax only the amount of money derived from or belonging to and the amount in value of all credits arising out of business transacted by a natural person within the State.

The State Constitution, Section 1, Article 10, provides that:

> "_____ taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value_____"

The tax here in dispute is a property tax. We do not have for consideration a privilege, license or income tax. Granted that a state might make a reasonable distinction between the privilege exercised by a corporation and that of an individual or firm, we are not here concerned with any such question. It is a fundamental principle of taxation that a direct property tax must be uniform, irrespective of ownership. It must apply uniformly to all property regardless of its ownership and a state may not discriminate against property owned by corporations in favor of property owned by individuals and firms.

To give an example of the practical workings of these two sections, we respectfully suggest the following situation: An Ohio resident living across the Ohio River from Wheeling, West Virginia, is engaged in business both in

West Virginia and Ohio with his principal office in Wheeling. He manufactures in Ohio and West Virginia and sells goods to residents and non-residents of West Virginia. Such an individual would not pay in West Virginia, under said Section 15, a tax upon the money which he may have deposited in banks in Pittsburgh, Pennsylvania, derived from goods manufactured and sold in Ohio, nor would he pay a tax in West Virginia under said Section on the credits arising out of his Ohio business, even though said business was directed from his office in Wheeling. Such intangible property is of the same character as that upon which appellant is taxable. The fact that appellant is a corporation cannot justify this discrimination in the statutes relating to taxation of property. The use of the property is the same. This distinction between property of corporations on the one hand and that of individuals and firms on the other is not based upon anything having any relation to the purpose for which it was made. Appellant has been denied the right, guaranteed to it by the State Constitution, to have its property taxed uniformly with that of individuals and unincorporated firms, and has been denied the equal protection guaranteed to it by the Federal Constitution. Corporations are persons within the meaning of the Fourteenth Amendment.

Smyth v. Ames, (1898), 169 U. S. 466, 42 L. Ed. 819;

Southern Railway Co. v. Greene, (1910), 216 U. S. 400, 54 L. Ed. 536.

Classification must be based upon some reasonable foundation.

F. S. Royster Guano Co. v. Virginia, (1920), 253 U. S. 412, 64 L. Ed. 989.

Unreasonable classification results in unlawful discrimination.

Quaker City Cab Co. v. Pennsylvania, (1928), 277 U. S. 389, 72 L. Ed. 927;

Louisville Gas & Electric Co. v. Coleman, (1928), 277 U. S. 32, 72 L. Ed. 770;

Hans Rees' Sons, Inc. v. State of North Carolina, (1931), 283 U. S. 123, 75 L. Ed. 879.

This case comes directly within the decision in **Quaker City Cab Co. v. Pennsylvania, supra.** In fact the invalidity of the statute here is more apparent. The Pennsylvania statute provided for a tax upon "gross receipts" of incorporated carries and did not impose a like tax upon similar businesses of individuals. In the instant case the tax is a direct property tax, and the clear discrimination in the statutes against property owned by corporations and in favor of property owned by individuals and unincorporated firms cannot be justified upon any theory. Nor can the assessment here made be justified upon the theories set forth in the dissenting opinion of Mr. Justice Brandeis in the Quaker City Cab case. While a tax upon gross receipts or a tax upon the privilege of doing business may at times be subject to reasonable classification, the question of classification cannot and does not here arise.

We respectfully submit that a statute classifying property according to ownership, and subjecting the property of a corporate owner to taxation while exempting similar property owned by an individual or firm, creates a discrimination violative of the equal protection clause of the Fourteenth Amendment. Under the two sections of the state law a corporation with exactly the same amount of money and credits and doing exactly the same amount and kind of business as an individual or unincorporated firm would be taxed upon all of such money and credits, while the individual or firm would not be taxed upon money and

credits derived from business transacted outside the state.

B. Said Sections, when read in connection with Sections, 2, 4, 5, 6 and 7, Article 6, Chapter 11 of the Code, which limit the assessment for taxation of similar property owned by persons, firms or corporations operating as public utilities to property "wholly held or used in this State", operate to deny this appellant the equal protection of the laws.

A further instance of inequality suffered by the appellant under the rule of the State Courts is demonstrated by a comparison of the provisions of Sections 12 and 13 of Article 3, Chapter 11 of the Code, relating to business corporations, with the provisions of Section 2, Article 6, Chapter 11 relating to the assessment of similar property owned by railroads. Said Section 2 provides that the operator of a railroad, whether individual, unincorporated firm, domestic or foreign corporation, shall show in its annual return to the Board of Public Works "(f) personal property, of every kind whatsoever, including money, credits and investments wholly held or used in this State, showing the amount and value thereof in each county." This return is made by each railroad doing business in West Virginia, irrespective of the location of its principal or general office and irrespective of the place where the control of its activities is exercised. Railroads as a general rule do business in more than one state. Appellant is likewise doing business in several states. At least 75% of the bank deposits and credits owned by it on January 1, 1933, the date of the assessment herein complained of, had arisen or had been derived from business done by it in states other than West Virginia (R. 7). Is there any reason for taxing the intangibles of a manufacturing corporation derived from business done in states other than West Virginia while per-

mitting similar property of a railroad company to go untaxed? Under the State Constitution classification of property according to ownership cannot be made. Classification, even when permitted, cannot be made arbitrarily. It must be founded upon a substantial, reasonable and just basis. Discrimination according to ownership of property does not afford such a basis.

> "The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation."
>
> **Quaker City Cab Co. v. Pennsylvania, supra**

The money, credits and investments of car lines, pipe lines, express companies and telephone and telegraph companies, whether operated by individuals, unincorporated firms or domestic or foreign corporations, are assessed for taxation in the same manner as railroads and afford a like comparison. Sections 4, 5, 6 and 7 of Article 6, Chapter 11 of the Code have not been printed in full in this brief, but the provisions with respect to the assessment of the money, credits and investments to be reported by such companies are the same as those applicable to railroads, and only such money, credits and investments as are, in the words of said Sections, "wholly held or used in this State", are subject to

taxation. The State Courts are prevented by law from applying to such companies the rule they have held applicable to this appellant. This difference in the statutes results in a discrimination against ordinary business corporations and in favor of public utilities. A railroad or telephone company, doing business in West Virginia and Ohio, having its principal or general office in West Virginia, is taxed only upon those of its intangibles which are wholly held or used in its West Virginia business. Under the State Court's decision, however, the appellant, a manufacturer, is taxed upon all its intangible property, without reference to the derivation or use of such property. Money, credits and investments, whether owned by a manufacturing corporation or by a public utility, are of the same general nature and must, under the Constitution of West Virginia and the Fourteenth Amendment of the United States Constitution, be similarly treated. There is no justification in the law for the discrimination present in this case.

We submit, therefore, that Sections 12 and 13, Article 3, Chapter 11 of the Code, as interpreted by the State Courts, when read in connection with the Sections of the Code pertaining to the assessment of property owned by public utilities, clearly discriminate against the appellant and in favor of individuals, unincorporated firms, domestic and foreign corporations operating railroads, car and pipe lines, express companies and telephone and telegraph companies.

Quaker City Cab Co. v. Pennsylvania, supra;
Louisville Gas & Electric Co. v. Coleman, supra;
Hans Rees' Sons, Inc. v. State of North Carolina, supra.

It is respectfully submitted that the judgment of the Circuit Court of Ohio County should be reversed.

Wheeling, W. Va.
February 17, 1936

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